UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CLAIRE JACOBSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 98-248-P-H***
	)	
RAYTHEON AIRCRAFT	***)***	
COMPANY, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON MOTION TO INTERVENE

United States Aviation Underwriters, Inc. ("USAU") seeks to intervene pursuant to Fed. R. Civ. P. 24 in the instant wrongful-death action arising from the 1996 crash of a Beech King Air E-90 aircraft in Wiscasset, Maine, killing the pilot, Cecil Jacobson, and sole passenger, Steven Ruma. Motion of United States Aviation Underwriters, Inc. for Intervention Under Rule 24, etc. ("USAU Motion") (Docket No. 10). Defendants Raytheon Aircraft Company and Beech Aircraft Corporation object. Defendants Raytheon Aircraft Company's and Beech Aircraft Corporation's Opposition, etc. ("Raytheon/Beech Opposition") (Docket No. 11). For the reasons that follow, I recommend that the motion be denied.

I. Intervention of Right

A would-be intervenor is entitled to intervention of right pursuant to Fed. R. Civ. P. 24(a)(2)

upon a showing that (i) its application is timely, (ii) it has an interest relating to the property or transaction that is the subject of the action, (iii) it is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and (iv) its interest will not be adequately represented by existing parties. *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989). All four criteria must be met. *Id.*

A. Timeliness

The First Circuit identifies four factors relevant to evaluation of the timeliness of a petition to intervene: the length of time the petitioner knew or reasonably should have known of its interest before seeking intervention; prejudice to existing parties because of delay; prejudice to the petitioner if unable to intervene; and whether unusual circumstances militate for or against intervention. *Narragansett Indian Tribe v. Ribo, Inc.*, 868 F.2d 5, 7 (1st Cir. 1989).

Claire Jacobson, widow and personal representative of the estate of pilot Cecil Jacobson, filed the instant action against Raytheon and Beech, as well as Downeast Flying Services, Inc. a/k/a Downeast Express, Inc. ("Downeast Flying") and Downeast Business Brokers, Inc., in the District Court for the Southern District of New York on March 5, 1998. Civil Action Complaint (Docket No. 1-A). The case was transferred to this court by order dated June 18, 1998. Joint Stipulation and Order (Docket No. 1). USAU moved to intervene on February 2, 1999 — nearly eight months after the transfer. Its motion nonetheless is timely, USAU argues, because it seeks in the instant case to assert subrogation rights against Raytheon and Beech that did not arise until January 12, 1999. USAU Motion at 2, 4. On that date, USAU reached a settlement on behalf of its insureds Downeast Flying and Ruma Advisory Co. Inc. ("Ruma Advisory") in three wrongful-death actions involving

Steven Ruma, the passenger who died in the crash.[1] *Id*. at 2. Raytheon and Beech were not parties to the Ruma actions; however, at USAU's request their liability, if any, to the Ruma plaintiffs was released with USAU expressly preserving its rights of contribution against them. *Id*. at 2-3. USAU, in addition, paid a so-called "hull" claim of $623,000 to its insured Ruma Advisory to compensate for the destruction of the aircraft in the crash. *Id*. at 3. USAU now seeks to assert both contribution claims (arising from the Ruma wrongful-death settlement and the hull-claim payout) against Raytheon and Beech in the instant case. *Id*. at 4-5.

Raytheon and Beech assail the timeliness of USAU's request on grounds that USAU was — or should have been — aware of its potential interest upon payout of the hull claim, the date of which USAU conspicuously fails to mention. Raytheon/Beech Opposition at 6. USAU's insureds, moreover, inexplicably failed to cross-claim against Raytheon and Beech in the Ruma actions or seek to consolidate the Ruma and Jacobson actions, Raytheon and Beech observe. *Id*. In any event, Raytheon and Beech assert, the allowance of intervention now would work great prejudice to the existing parties. *Id*. at 3-5. This is so, Raytheon and Beech maintain, in view of the following:

1. The motion deadline in the instant case was February 25, 1999. *Id*. at 2; *see also* Endorsement to Motion To Amend Scheduling Order (Docket No. 7).

2. The discovery deadline was March 5, 1999, with trial set for May 1999. *Id*.; *see also* Endorsement to Consented to Motion To Amend Scheduling Order (Docket No. 9).

3. Extensive discovery already has been undertaken, including the production of thousands of pages of documents, the taking of eleven depositions and the designation of a dozen expert witnesses. Raytheon/Beech Opposition at 1.

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[1]Ruma Advisory is not a party to the instant action.

4. The addition of the USAU subrogation claims would cause significant delay and add to the complexity of the case by necessitating the reopening of discovery and opening the door to the possible filing of additional motions related to the newly asserted claims. *Id*. at 3-5. Raytheon and Beech, for example, would need to investigate the hull and Ruma wrongful-death payouts to determine, *inter alia*, whether payments made by USAU were reasonable and whether other entities, not parties to the instant litigation, might be responsible. *Id*. at 4. Raytheon and Beech might want to designate their own experts on the reasonableness of the USAU payouts; they certainly would wish to depose USAU's experts. The jury, moreover, would be called upon to grapple with subjects not currently at issue, such as the value of the aircraft and the value of the claim of Ruma's estate. *Id*. at 5.

Tellingly, USAU does not address the Raytheon/Beech observation that its motion is untimely on grounds that its interest arose prior to January 12, 1999, upon payout of the hull proceeds. Reply of United States Aviation Underwriters, Inc., etc. ("USAU Reply") (Docket No. 16) at 2. USAU focuses, instead, on solutions to mitigate the impact of its late entry, including: (i) adhering to existing scheduling orders; (ii) producing its own expert report within two weeks of its intervention; (iii) seeking only a minimal extension of the discovery period; (iv) stipulating to mediate the issue of damages in advance of trial to ease any potential discovery problems for the defendants; and (v) making deponents readily available to the defendants. USAU Motion at 4; USAU Reply at 3. At bottom, it argues, the defendants would be no worse off than if forced to defend themselves in a separate subrogation action — an outcome that it suggests would drain an even greater number of resources than allowing USAU to piggyback on the instant, related case. USAU Reply at 3. USAU's offers, however, fail to mask the fundamental fact that its intervention

would have a significant impact, requiring the reopening of discovery, potentially necessitating the filing of additional motions, and interjecting issues that otherwise simply would have no bearing on the instant case. *See Narragansett*, 868 F.2d at 8 ("allowing the proposed intervenors to join the fray on the eve of trial would have been manifestly unfair to plaintiff"). A stipulation to mediate the issue of damages prior to trial would do much to cushion the blow; however, Raytheon and Beech give no indication of interest in such a solution.

USAU finally seeks to counterbalance any prejudice to the defendants by pointing to the prejudice it would suffer if forced to sit on the sidelines while the issue that is the linchpin of its subrogation rights — the liability of Raytheon and Beech — is litigated in the instant case. USAU Motion at 4-5. For reasons discussed below, however, I do not find that USAU's rights would be significantly prejudiced.

Relevant factors, accordingly, point to a finding of the untimeliness of USAU's motion to intervene.[2]

B. Interest in Subject of Lawsuit

While "[t]here is no precise and authoritative definition of the interest required to sustain a right to intervene under Rule 24(a)(2)," the First Circuit has suggested that a would-be intervenor must demonstrate a "direct, substantial, and legally protectible" interest in the lawsuit in which it wishes to intervene. *Dingwell*, 884 F.2d at 638 (citations and internal quotation marks omitted). USAU's interest in obtaining contribution from Raytheon and Beech undoubtedly is substantial and legally protectible. It is not, however, a "direct" interest in the case at bar. The subrogation rights

[2]The parties do not identify the presence of any unusual circumstances militating for or against intervention.

at issue arise not from payments made in connection with the Jacobson claims but rather from those made in satisfaction of the separate (albeit related) Ruma and Ruma Advisory claims.

C. Impairment of Ability to Protect Interest

USAU complains that if it is not permitted to intervene in the instant action, it may be subject upon bringing separate suit to collateral-estoppel or res-judicata defenses by Raytheon and Beech based upon liability determinations made in this case. USAU Motion at 5; USAU Reply at 4. Raytheon and Beech point out, correctly, that these defenses may be asserted only against those who were parties to a previous action or their privies. Raytheon/Beech Opposition at 8-9; *see also Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir. 1994). To the extent USAU implies that it would be hurt by the *stare decisis* impact of any such adverse liability determination, the force of such an argument is undercut when existing parties adequately represent the would-be intervenor's position. *International Paper Co. v. Town of Jay, Maine*, 887 F.2d 338, 344-45 (1st Cir. 1989). Such is the case here.

D. Adequate Representation by Existing Parties

Plaintiff Jacobson, USAU argues, would not necessarily adequately represent its interests inasmuch as USAU is singularly concerned with the particular liability of two defendants, Raytheon and Beech. USAU Motion at 5-6. The plaintiff has no particular interest in the level of fault of any one defendant, USAU observes, because she potentially may collect the entire judgment from one. *Id*. Thus, the plaintiff may well choose to settle with Raytheon and/or Beech or, for other reasons, forgo vigorous prosecution of her liability case against them. *Id*. at 5.

Raytheon and Beech, by contrast, perceive USAU's goal as identical to that of the plaintiff: to hold Raytheon and Beech liable. Raytheon/Beech Opposition at 9. The greater the pool of

defendants held liable, Raytheon and Beech reason, the greater the likelihood that the plaintiff will be able to satisfy her judgment from among available funds. *Id*. In any event, Raytheon and Beech argue, to the extent that the plaintiff did not adequately represent USAU's interests, Downeast Flying would. *Id*. at 10. Downeast Flying, Raytheon and Beech point out, surely has a strong interest in the imposition of liability on Raytheon and Beech. *Id*.

Raytheon and Beech make out a persuasive case that the plaintiff and Downeast Flying, in combination, will adequately represent USAU's interest in seeking to hold Raytheon and Beech accountable for the 1996 airplane crash. When an existing party shares "the same ultimate goal" as a would-be intervenor, the adequacy of representation is presumed. *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). To overcome that presumption, a would-be intervenor ordinarily must demonstrate "adversity of interest, collusion, or nonfeasance." *Id*. While USAU suggests that the plaintiff's interests may be adverse, it provides no concrete underpinning for such speculation, such as evidence of the undertaking of settlement talks. *See Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998) (applicant for intervention need only make minimal showing of likelihood of inadequate representation; nonetheless, it "must produce some tangible basis to support a claim of purported inadequacy"). In all, USAU fails to dispel the impression that its interest in holding Raytheon and Beech liable substantially coincides with those of the plaintiff and defendant Downeast Flying. *See, e.g.*, *International Paper*, 887 F.2d at 342 (state of Maine and town of Jay "in substantial agreement as to the proper outcome of this case").[3]

[3]USAU also points out that no current party has the right to assert the subrogation claim for damage to the aircraft and, thus, this important interest will go unrepresented if it is not permitted to intervene. USAU Motion at 5. This argument is circular, however, inasmuch as the current action has nothing to do with the value of the aircraft — a factor that cuts against allowance of intervention.

II. Permissive Intervention

To qualify for permissive intervention under Fed. R. Civ. P. 24(b)(2), a petitioner must satisfy the requirement of timeliness and assert claims or defenses that have "a question of law or fact in common" with the main action. The court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). The First Circuit imposes the additional threshold requirement of proving independent jurisdictional grounds for the claims or defenses. *International Paper*, 887 F.2d at 346. The court retains discretion to refuse permissive intervention even if all minimal requirements are met. *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 83-84 (D. Me. 1988), *aff'd*, 884 F.2d 629 (1st Cir. 1989).

Inasmuch as I have determined, for the reasons stated above, that USAU's motion for intervention of right is untimely and will unduly prejudice adjudication of the rights of the original parties, I recommend that its motion for permissive intervention also be denied.

III. Conclusion

For the foregoing reasons, I recommend that USAU's motion to intervene be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 17th day of March, 1999.

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David M. Cohen
United States Magistrate Judge